IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT,
Petitioners,

v.

FOUR COUNTIES WATER USERS ASSOCIATION
and
LYNN A. MATHESON
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

RESPONDENT'S REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States limits its concern to the narrow question of whether the opinions of the Colorado Supreme Court discriminate against a Federal agency. The United States does not suggest that the Colorado Supreme Court's opinions finding a lack of intent to appropriate water were in error. It merely suggests that the rulings in question "appear to have turned" on the limited authority of the Federal employees performing the work and that it "appears" such work would have been acceptable to establish

priorities if performed by private persons. The United States cites no authority to support its concern and, as is shown below, nothing can be found in the opinions to give substance to the United States' concern.

As explained in earlier briefs, the right to relate an appropriation of water back to a fixed date is dependent upon the presence or absence on that date of the intent to carry out a fixed plan to divert water. *City and County of Denver v. Northern Colo. Water Cons. Dist.*, 130 Colo. 375, 388, 276 P.2d 992, 1001 (1954). In 1916 the Colorado Supreme Court declared that a finding of intent rests upon "physical acts and manifestations in pursuance of such intent" and "nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue, and, within a reasonable time, ultimately acquire a right to the use of water. . ." will initiate an appropriation. *Fruitland Irrig. Co. v. Kruemling,* 62 Colo. 160, 165, 162 P. 161, 163 (1916).

The Colorado Supreme Court has consistently followed these rules. For example, a small amount of earth moving and the purchase of lands have been held not to evidence intent. *Fruitland Irrig. Co. v. Kruemling, supra,* at 165-166. Even extensive "investigation and exploratory" work done jointly by the City of Denver and the Bureau of Reclamation has been rejected as insufficient to establish an intent to initiate an appropriation of water. *City & County of Denver v. Northern Colo. Water Cons. Dist., supra,* at 395-400. In *Denver* the Colorado River Water Conservation District (the petitioner here) successfully argued the Denver-Bureau investigation did *not* initiate an appropriation under Colorado law. Moreover, this Court in *Wyoming v. Colorado,* 259 U.S. 419, 494-495 (1922), adhered to the Colorado rule in awarding a priority for a private Colorado citizen's claim for water adverse to Wyoming.

As applied to the instant case, the rules consistently followed by the Colorado Supreme Court and adopted in *Wyoming v. Colorado* preclude holding the work done by

the Bureau of Reclamation was sufficient to initiate an appropriation. The Colorado Supreme Court found the only physical acts performed for each project consisted of spending a few days in the field, primarily for the purpose of making land classification surveys. The testimony of a Bureau of Reclamation official confirmed that this work was only investigative and exploratory. The Colorado Supreme Court noted that no further work was done after the Bureau completed a report on its investigation. Thus, the Colorado Supreme Court merely held that, at the time Bureau employees conducted reconnaissance investigations of possible project sites, the Federal Government had not determined *at any level* to construct the projects in question.

Colorado law did not operate against the United States because of the lack of authority of the persons conducting the preliminary investigations, since even the highest officials could not have initiated an appropriation on the basis of these investigations absent the requisite intent or commitment. Under Colorado law, water cannot be appropriated by drawing lines on a map or random examination of possible project locations. Commitments must be made, followed by diligent prosecution of these commitments.

The United States is wrong in asserting that a different rule would be applied to a private corporation. Given the requisite intent, any representative of the appropriator, public or private, may perform the work necessary to evidence an attempted appropriation.

In summary, the State Supreme Court did not apply a discriminatory rule against, and therefore did not prejudice the interest of, the United States. Had the State Supreme Court decided differently than it did, a discrimination in favor of the United States and against respondent would have resulted.

As to the acceptance by the United States of Petition-

er's argument that "many projects" will be adversely affected by the decisions in question, it can only be said that this is an attempt to bolster the unsound premises discussed above. Respondent has clearly set out the reasons why almost all other Federal projects are protected under state law from any adverse impact of the decisions in question (Respondent Four Counties Br. pp. 5-6). It is unclear how this statutory protection "points only to further litigation" as the United States suggests.

For the reasons given above and in Respondent Four Counties Reply Brief, we believe that review is not warranted.

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